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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 641.

AETNA LIFE INSURANCE COMPANY,
Petitioner,

vs.

JEANNETTE E. BARNETT and LEON E. STROPP.

No. 642.

AETNA LIFE INSURANCE COMPANY,
Petitioner,

vs.

SAVINGS INVESTMENT & TRUST COMPANY.

No. 643.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,

vs.

JEANNETTE E. BARNETT.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS, JEANNETTE E. BARNETT AND LEON E. STROPP.

IN OPPOSITION TO PETITION AND BRIEF FOR WRITS OF CERTIORARI.

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Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit, which is printed in the record (R. 559-565), is reported in 139 F. 2d (Adv. Op.) 483. No opinion was filed by the District Court of the United States for the District of New Jersey.

Statement of Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on December 9, 1943 (R. 565-567). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 23, Sec. 347).

In the petition (Pet., p. 8) the reasons submitted for the allowance of the Writs of Certiorari are as follows:

1. The Circuit Court of Appeals in affirming the District Court's instructions to the jury has decided an important question of local law in a way probably in conflict with the local decisions.

2. The Circuit Court of Appeals in affirming the District Court's rejection of an inventory and account of receiver (Ex. D-9, p. 86A, Vol. II, offered R. 347a) has decided an important question of Federal Law which has not been but should be considered by this Court.

Statement of the Case.

A more complete statement of the facts than that contained in the petitioner's brief is required in order to determine whether there are sufficient grounds to sustain the petition now before the court.

Jeannette E. Barnett and Leon E. Stropp instituted suit in the New Jersey Supreme Court against the Aetna Life Insurance Company claiming the death benefits under a policy in the amount of $30,000 issued by that Company on the life of Robert James Barnett. The plaintiff-respondent, Jeannette E. Barnett, wife of the insured, was the named beneficiary. The beneficiary agreement attached to said policy made payable to Leon E. Stropp, creditor, an

amount as his interest may appear, the remainder to Jeannette E. Barnett (Exs. P-2, P-8A, Vol. II, offered R. 37a).

A similar suit was instituted by Jeannette E. Barnett against the Equitable Life Assurance Society of the United States in the New Jersey Supreme Court upon a policy issued by that Company in the face amount of $5,000 on the life of Robert J. Barnett. The plaintiff-respondent, Jeannette E. Barnett, the wife, was the sole beneficiary (Exs. P-1, P-1A, Vol. II, offered R. 36a). Both actions were removed to the Federal Court by the petitioner and were consolidated at the trial with the suit by the Savings Investment and Trust Company against the Aetna Life Insurance Company. In each of the complaints the respondent pleaded that the insured Barnett had absented himself from his last known residence in New Jersey for seven years successively and had not been heard from or of and is presumed dead by reason of the statute of New Jersey in such case made and provided (R. 4a and 27a).

It is inaccurate to assert, as do the petitioners on page 7 of their brief, that the respondents abandoned the claim of suicide. See also Proofs of Claim (Ex. P-6, p. 37a, Vol. II, offered R. 55a and P-8, p. 53a, offered R. 55a).

The facts produced at the trial were these:

Robert J. Barnett was born July 24, 1894 (R. 75a) and married Jeannette E. Barnett February 9, 1918 (R. 38a). Robert J. Barnett was a banker and had been in the banking business all his adult life (R. 41a, 42a).

At the time of his disappearance on December 28, 1932, he lived in the home which he and his wife owned at 143 Forrest Avenue, Glen Ridge, New Jersey. He was at that time President of the Discount Corporation, a company which he had formed (R. 61a). Previously, he had been successively Vice President and President of the East Orange Trust Company (R. 112a).

From the date of his marriage to the date of his disappearance he and his wife had lived together as a happy and devoted couple. He was a temperate man, never drank, was fastidious and meticulous in his dress and habits and was a regular attendant at church. His wife so testified (R. 43a, 53a to 55a). In this she was supported by the testimony of insured's mother, Mrs. Minnie A. Barnett, his brother, William V. Barnett, his brother-in-law, Harold H. Sherwood, Mrs. Barnett's sister, Annette Evelyn Wheeler, her brother-in-law, J. Watson Wheeler, the co-plaintiff, Leon E. Stropp, friend of the family and business associate of Barnett, Henry E. Freytag, Harry C. Griffith, Edward W. Simpson, other business associates and friends of Mr. and Mrs. Barnett and Mrs. Therese M. Davies, who boarded at the home of the Barnetts (R. 110a, 121a, 131a, 106a, 103a, 97a, 113a, 171a, 325a, 207a).

Only twice during his married life was he away from his wife, and then only over night on a business matter (R. 54a). He had the habit of notifying his wife if he was to be late for dinner (R. 42a).

With his wife he would visit his parents in Ridgefield Park and on alternate holidays and occasions would visit her parents and sister and brother-in-law in Kingston, New York. He and his wife would visit with Barnett's brother and with Barnett's sister and brother-in-law.

Prior to his disappearance, he had been involved in a litigation with the Savings Investment & Trust Company, which litigation terminated adversely to Barnett, the decision being rendered on December 15, 1932 (R. 42a). As a result of this suit, he and other friends and associates of his were required to stand a considerable financial loss which Barnett in the aforementioned suit had claimed was the responsibility of the Savings Investment & Trust Company and not his and that of various associates. The adverse

result of this litigation greatly upset Barnett and depressed him. His wife so testified (R. 92a). His friend and fellow director, a retail druggist, Henry E. Freytag, testified that during the trial of the suit against the Trust Company Barnett was extremely nervous and upset, that "his mind didn't function the way it normally did", that he was normally a man of keen mind and that he didn't seem to know that someone was talking to him when he was being addressed. Freytag also testified that he knew Barnett was taking nerve tonic and nerve sedatives, because he, Freytag, filled his prescriptions (R. 113a, 114a).

The litigation with the Savings Investment & Trust Company received much publicity in the newspapers, including pictures of Barnett (R. 64a, 65a). While this litigation was going on, he received a telegram from a Marie Jordan, whom the defendants, in their brief (p. 6) have characterized as a mild sort of blackmailer. The telegram asked him for money (Exs. D-1, D-15, pp. 71a, 103a, Vol. II, offered R. 233a, 485a). It was received while Mr. and Mrs. Barnett were at his mother's and was telephoned to him there by a Mrs. Davies, a boarder at Robert J. Barnett's home (R. 208a). Mr. and Mrs. Barnett reported the matter to the police (R. 65a). The supposed sender was unknown to him (R. 164a).

On December 24, 1932, Barnett and his wife visited her mother, sister and brother-in-law in Kingston, New York. They remained there until December 27, 1932 (R. 41a). During this visit, Barnett was continuously with either his wife or one or more of his in-laws. The sister-in-law (R. 107a) noticed his nervousness and restlessness. The Barnetts returned to their home in Glen Ridge for evening dinner on December 27, 1932. The following morning, December 28, 1932, Barnett left for his office at the Discount Corporation in East Orange, New Jersey. He gave no indication that he would not return in the evening. At

breakfast that morning, however, was the last time Mrs. Barnett saw her husband, Robert James Barnett (R. 41a, 42a).

When Barnett failed to return home for dinner in the evening at his usual time, Mrs. Barnett became anxious. She inquired of his business associate to learn if he had been detained. She also inquired at the Glen Ridge Police (R. 44a) seeking to learn if a mishap had occurred.

The following morning Mrs. Barnett received in the first mail at the house a letter in the handwriting of her husband, Robert James Barnett, in an envelope addressed by him and mailed from New York. (Exs. P-4 and 5, pp. 33a, 34a, Vol. II, offered R. 46a), which read as follows:

> "Dearest Jen:—
>
> "My heart is broken—my spirit is gone and I am almost crazy. I cannot go on.
>
> "For your sake, Dearest, while something is left —I must make the sacrifice—for you and your future. What have you to look forward to with me. You are too good, too wonderful, as you have been a wife and companion, to suffer longer. See H. C.—don't let the insurance lapse, see L. E. S. about this.
>
> "It is your salvation, there should be about $25,000—out of Stropp's balance pay H. C. 7500—Henry 4500 and Ed W. S. $2,500. Take care of Father's $1,500 ($500 old).
>
> "Forgive me and may God bless you and protect you as long as you live.
>
> "Bob."

Mrs. Barnett called her husband's family who came to the insured's home, as did the brother-in-law and other friends (R. 48a). Mrs. Barnett was prostrated with grief. The Glen Ridge Police were notified, and a five-state alarm was sent out (R. 153a). The East Orange Police, where

Barnett's office was located, started a search. Four or five days after the disappearance, the East Orange Police returned the insured's clothes, watch and jewelry with the exception of his socks and underclothing (R. 51a, 52a, 57a).

The brother, William V. Barnett, advertised in New York and Boston newspapers for his brother and offered a reward (R. 119a). The brother-in-law, Mr. Sherwood, and his lawyer, James W. Jackson, conducted an investigation (R. 132a). Jackson also advertised in the newspapers for Barnett (R. 192a, Ex. P-6, p. 41a, Vol. II, offered R. 55a). The brother-in-law and his attorney also interviewed the porter of the steamer Plymouth of the Fall River line on which Barnett's clothes were found (R. 133a, 180a).

Within a week or two after the disappearance, Sherwood and Jackson, having learned of the telegram aforementioned (Ex. D-15) called at the address mentioned in the telegram and inquired for Marie Jordan, who was therein mentioned. The occupants of the address, 71 Emmet Street, denied knowing Robert J. Barnett. Jackson and Sherwood left their cards (R. 133a, 140a, 183a). The next day as a result of a telephone call from Marie Jordan, Jackson and Sherwood met her in Newark. She told the story of having been "picked up" by Barnett on Broad Street in Newark around Decoration Day in 1932 (R. 185a). She claimed to have gone out with him. She promised to advise them if she heard from Barnett. Shortly thereafter she brought to attorney Jackson's office in New York a letter which she claimed was from Barnett (Ex. P-9, p. 66a, Vol. II, offered R. 187a). This letter purportedly requested Marie Jordan to meet Barnett at the Tube Station in New York on a certain date. She was asked by Jackson to produce the envelope. This she failed to do. She brought only a cancelled stamp. (Ex. P-10, p. 68a, Vol. II, offered R. 188a). Jackson, having compared the handwriting of

the letter with specimens of Barnett's handwriting, realized that they were totally different. Subsequently, when Marie Jordan was called as a witness by the defendant, she admitted that this letter was entirely false and was written by a friend of hers, Therese Wallace Costa (R. 286a-288a).

Mrs. Barnett continued to reside at the Glen Ridge home until May of 1932 (R. 49a). She then visited her mother for a year in Kingston, New York. She also stayed with her sister in Ohio for two months, and then went to Philadelphia with friends for a short time and to Ocean City, New Jersey for two weeks. She returned and sought work in New York (R. 58a, 59a). She obtained employment in New York and has been supporting herself ever since (R. 53a, 60a). After obtaining employment, Mrs. Barnett resided at the Marlborough Hotel (R. 60a), where she and Mr. Barnett had resided before making their home in Glen Ridge (R. 77a). Thereafter Mrs. Barnett continued to reside in East Orange in a boarding house (R. 60a). Mrs. Barnett never saw her husband again after the morning of December 28, 1932 and never heard from him again with the exception of the aforementioned letter. No member of his family or her family and none of his close friends or business associates ever saw or heard from him after December 28, 1932. The police, despite a five-state alarm and diligent search over years, never found any trace of Barnett.

No evidence was offered by the petitioners and no evidence was elicited by the defense on the cross-examination of any of the respondents' witnesses that would permit the possibility of an inference that the wife or the family or close business associates of Barnett had seen or heard from him, or that a thorough and diligent investigation had not been made. Not the slightest proof appears in the case that the wife, family and business associates of Robert J.

Barnett are anything but persons of the highest type, highly respected in their business and communities.

The petitioners produced Marie Jordan Fosselli. She testified that she had met Barnett in June of 1932 at Broad and South Streets in Newark (R. 229a, 230a), and that she saw him once or twice a week, until he disappeared, at the home of a friend at 97 Emmet Street, Newark, New Jersey (R. 231a). She admitted sending the telegram (Ex. D-1), and that she saw him once thereafter (R. 233a, 234a). She claims to have been given money by him and to have been with him on 13th Avenue, Newark (R. 236a). She admitted that the letter (Ex. P-9) which she had given to Jackson advising him that it was from Barnett, was absolutely false. She claimed to have talked over the telephone with Barnett in February of 1933 (R. 239a), although she had never spoken to him on the telephone before (R. 298a).

On cross-examination, she admitted that the contents of the telegram (Ex. D-1, p. 71a, Vol. II, offered, R. 233a) that she had sent to Barnett were absolutely false (R. 271a, 272a, 276a). She stated that in the supposed telephone call from Barnett in February of 1933, he had requested her to meet him at the Hudson Tubes in New York at 2 p. m. She and a number of policemen from New York and New Jersey went there on the appointed day and waited, but Barnett never showed up (R. 295a, 296a). It is interesting to note that the place and hour where she claimed Barnett had requested to meet her in the alleged telephone call, namely, Hudson Tube Station, and of which she had informed the police, was the same place and hour at which Barnett was to have met her a few weeks earlier according to the letter (Ex. P-9) which she had given to Mr. Jackson and which she admitted was false and pure fabrication. She never claimed to have heard from Barnett after February of 1933.

Francis X. Sullivan, New York Subway policeman and former doorman at the apartment house at 205 East 78th Street, New York City from 1930 to 1935, testified on direct examination, that about twice a week (R. 362a) during the summer of 1934, a man, giving his name as Robert Barnett, came to that building to see a tenant, Miss Rivers (R. 361a, 364a, 365a). Sullivan was first questioned about Barnett in 1940 by Mr. Provost, who was connected with The Equitable Life Assurance Society of the United States (R. 366a, 381a). Sullivan also claimed that some months after Barnett had ceased coming to the building, two New York detectives had interrogated "another man in the building, gave him a picture and when he saw it, he recognized the picture" (R. 367a). Sullivan identified the central figure in that picture (Ex. D-3, p. 73a, Vol. II, offered R. 360a) and the man in Exhibits D-4, D-5 and D-6 as being Robert J. Barnett.

On cross-examination, he admitted that he had studied to become a policeman in 1929 (R. 363a) and that it was Donlon, his brother-in-law, the Hall Captain of the apartment house, who had been questioned by the policemen in 1934 and 1935 and given a picture (R. 367a) with Barnett's name and police department case number on the back (R. 401a). He admitted that he and his brother-in-law examined and discussed the picture a great many times (R. 369a, 380a). He identified Miss Rivers as being in the neighborhood of 25 to 30 years old, "Blonde, slim built, fair complexion" (R. 397a). Significantly, his brother-in-law, Donlon, who worked in the same apartment house, testified that Miss Rivers was "kind of heavy, kind of plump" (R. 445a).

James Joseph Donlon, who contradicted his brother-in-law, Sullivan, as to the description of Alma Rivers, upon whom Barnett was supposed to have called, stated that he was first approached in the summer of 1934 by two New

York detectives and a police officer from the Sheriff's office in Essex County, New Jersey, who showed him a picture of Barnett and told him they had a warrant for him (R. 446a, 447a). He left a copy of the photograph with Donlon. Donlon claimed that in fall of 1934, Barnett called in a large car—Pierce Arrow coupe—(R. 449a, 456a) but Miss Rivers was not home; that he, Donlon, the Hall Captain, attempted to follow the alleged Barnett in a tenant's automobile.

On cross-examination, Donlon also admitted that he had been studying to become a policeman, and that the photograph given to him by the police in 1934 had a typewritten description of Barnett on the reverse side (R. 451a). He again contradicted his brother-in-law on cross-examination by stating that Barnett did not call on Miss Rivers in the summer of 1934, but only from March to June and once in October or November.

George R. Bradshaw, former superintendent of an apartment house at 33 East 22nd Street, New York City from 1937 to 1941, testified that Miss Ruth Baum was a tenant in the building in the summer of 1939; that she was visited 10 or 12 times by a man called Bob, who drove an automobile (R. 408a, 409a), and that he, Bradshaw, gave this man a little dog (cross between a poodle and a chow, R. 410a) which the so-called Bob had asked for and which the so-called Bob took away in his car, a greenish blue sports roadster with the top turned down (R. 412a).

Mrs. Barnett testified, however, that the insured didn't like dogs and objected to having one around the house (R. 510a, 511a). The brother, William Barnett, testified that he had never known his brother to own a dog. He had never even seen him stroke or pet a dog or show any affection for dogs (R. 517a).

Bradshaw identified the central figure in Ex. D 4 as being the man he had seen. On cross-examination he stated

that at the end of 1939 representatives of the police department showed him the photographs (Exs. D 4 and D 6, R. 413a). He testified that Miss Baum moved out in 1941 (R. 414a) and then later testified she moved out in 1939 (R. 423a, 426a). In 1940 he was shown a moving picture by two men whom he thought came from the insurance company (R. 418a, 419a). They also gave him a photograph like the one the police had given him and he always kept this in his desk. The man never came back after the police had interviewed the witness.

Albert H. Starke, superintendent of an apartment house at 299 West 12th Street, New York City, testified on direct examination that a man named Raymond Hatch was living there with one Alma Rivers in October of 1933 (R. 427a, 432a). He claimed to have seen a man with Hatch whom he identified from Exs. D 4 and D 6 on three occasions between September 25 and October 15, 1933 (R. 432a).

On cross-examination, he claimed that Miss Rivers was in the habit of inviting the witness to the apartment and confiding in him and that everybody in the building knew that Hatch was keeping this woman (R. 437a, 438a and 442a). He stated that the first time he saw this man was when he entered the building with Hatch and stood near while Hatch and the witness talked in the lobby (R. 435a). The second time he saw him was when the witness delivered a package to the Rivers' apartment and this man answered the door, and the third time, when he saw the man coming down the street with Mr. Hatch, and the witness met Hatch and started to talk and Hatch requested this gentleman to wait upstairs. He further admitted on cross-examination that in 1940 representatives of the insurance company (R. 441a) showed him Ex. D 3 (p. 73a, Vol. II, offered R. 360a). He admitted that there were about 300 people living in the apartment house in 1933 and that people

were coming and going all the time, and that he had worked in six other apartment houses in New York City (R. 442a).

James Cutsler, a part time bartender at the Blairstown Inn, in New Jersey, testified on direct examination that in November and December of 1940, he saw a person, who looked like the center figure in photograph Ex. D 3. He claimed to have seen this person five or six times at the bar where he served him an unusual brand of scotch—"Teachers" (R. 461a, 463a).

On cross-examination, he admitted that in June of 1941 two policemen came to the Inn, had a couple of beers, showed him a picture and asked him if he recognized the man. He advised them that he did (R. 477a). He further stated that immediately after being shown the picture and recognizing it, he was asked to sign an affidavit which had already been typewritten and merely required a signature and that these policemen discussed this alleged man and picture with him although he had never mentioned seeing this person either to the owner of the Inn or to anybody else (R. 480a).

In addition, the petitioners produced acting police Lieutenant Joseph E. McGinley, who testified that he made an investigation, certified the teletype messages sent out for him (R. 483a, 484a) and admitted that he had neither seen nor talked with Barnett since December 28, 1932. He admitted further that he knew him before that time (R. 488a, 489a).

The petitioners moved for a directed verdict (R. 518a, 524a) which the court denied. The case was submitted to the jury which returned verdicts in favor of all the respondents (R. 535a). Judgments were entered for the full amount of the policies together with interest from the date of the filing of the proofs.

The petitioners appealed from those judgments and they were affirmed by the Circuit Court of Appeals for the Third Circuit. Petitioners now make this application for a Writ of Certiorari.

Summary of Argument.

The respondents, Jeannette E. Barnett and Leon E. Stropp, respectfully submit that the petition for Writs of Certiorari should be denied because:

1. The Trial Court properly charged the jury with respect to the law of New Jersey applicable to the facts.

2. The Circuit Court of Appeals in holding that the Trial Court's exclusion of the inventory and account of receiver (Ex. D-9) was not harmful error has not decided an important question of Federal Law which has not been but should be considered by this Court.

I.

The Trial Court properly charged the jury with respect to the law of New Jersey applicable to the facts.

A. The respondents proved the necessary elements to invoke the statutory presumption of death. N. J. R. S. 3:42-1.

The statute of New Jersey, R. S. 3:42-1, upon which plaintiffs rely, provides as follows:

> "Article 1. Presumption of Death.
>
> "3:42-1. Death presumed after seven years' absence of resident or nonresident. If a resident or nonresident of this state remains beyond the sea, absents himself from this state or from the place of

> his last known residence, or conceals himself in this state or in the place of his last known residence, for seven years successively, *he shall, whenever his death comes into question, be presumed to be dead, unless it is proved he was alive within that time.*" (Italics ours.)

This statute clearly provides that where the actual death of an individual cannot be established by a death certificate or testimony of physician, the fact of such death may be established by proving that the individual absents himself from this state or from the place of his last known residence for seven years successively. In the case at bar, the respondents proved that from December 28, 1932, Robert J. Barnett had absented himself for over seven years successively from his last known residence in the state of New Jersey. With the exception of the letter received the following morning, he was not heard from or seen by his wife, relatives, friends or business associates thereafter. These facts were not denied, nor even disputed by the defendants. The statute, which has been part of the statutory law in almost identical language since 1797, has been construed to mean that the person seeking to invoke the statutory rule must in addition show that diligent inquiry has been made for the absentee in order to find him. In *Osborn* v. *Allen* (Sup. Ct., 1857), 26 N. J. L. 388, Chief Justice Green said:

> "* * * Evidence that the party was actually absenting himself from the state, or was concealing himself within the state, would necessarily prove that he was living, and would, consequently, rebut the very presumption that the statute was designed to create. All the proof that can be required or expected is, that the party has been absent from the state, or from his family or home, and has not been heard from within the period prescribed by the statute. * * *"

To the same effect is *Armstrong* v. *Armstrong* (Ch., 1926), 99 N. J. Eq. 19, 132 Atl. 237, affirmed on opinion below, 102 N. J. Eq. 330, 140 Atl. 918, and *Burkhardt* v. *Burkhardt* (Ch., 1902), 63 N. J. Eq. 479, 52 Atl. 296.

The respondents fully and completely met the requirements of the statute as construed by the courts of New Jersey. There was neither direct testimony nor any evidence from which an inference could be drawn which contradicted the evidence of the respondents that Barnett had disappeared from his home in New Jersey for over seven years, and despite diligent search and inquiry by his wife and relations and the police, had not been seen or heard from by his wife, relations, business associates and friends. He was a man devoted to his wife and to his own parents, and they to him, and who, by his last letter, showed that he was thinking of them and of all his close friends and business associates. Under those circumstances, it is respectfully submitted that the plaintiffs had clearly and indisputably proved the necessary elements to invoke the statutory presumption of death.

B. Under the New Jersey statute, the presumption of death can be overcome only by proof that the absent person is in fact alive.

The language of the statutory provision as to the presumption of death is clear and definite. Once the basic elements are established the presumption of death arises, and where those basic elements are not disputed or attacked, as in the case at bar, the presumption may be overcome only as the statute provides and the statute says he is "presumed to be dead *unless it is proved that he was alive within that time.*" (Italics ours.) As early as 1846, Chancellor Halstead said in the case of *Smith* v. *Ex'rs of Smith* (Ch., 1846) 5 N. J. Eq. 484, at 485,

> "The words of the statute and the reason of the thing require that, unless proof be made that the person absenting himself has been heard from, the presumption of his death arises at the expiration of seven successive years of absence. The party seeking to avoid this presumption, or, rather, to prevent its arising, can do it only by showing that the absent person was alive within the seven years. * * *"

The presumption of the death of Robert J. Barnett and the effect of that presumption could not be avoided by the petitioners unless they proved as a matter of fact that Barnett was alive subsequent to his disappearance.

C. Under the statute, the petitioners were the proponents of the issue that Barnett was in fact alive.

The trial court charged the jury as follows:

> "The burden is upon the plaintiffs to prove by a fair preponderance of the evidence the facts essential to the right of recovery. That is true in every case. These facts in this case, simply stated, are:
>
> "First, the issuance and subsistence of a policy of insurance; which fact is here admitted; second, the payment of premiums due thereunder; which fact is likewise here admitted; and, third, the death of the insured; which fact is denied."

After quoting the statute to the jury, the court said:

> "You are instructed that under the provisions of the statute the burden is upon the plaintiffs in the first instance to prove not actual death but absence of the insured from either the state or his place of residence for a period of seven years, seven successive years next preceding the filing of the proof of death with the defendant. This date is fixed as of February 27, 1940. Upon adequate proof of these facts, which in law are recognized as sufficient to

support a presumption of death, the insured is presumed to be dead unless it is proved by the party who disputes the presumption that the insured was, in fact, alive within the seven years next preceding the filing of the proof of death. * * *"

"Here the presumption of death is disputed by the defendants, who allege that the insured was, in fact, alive within the seven years next preceding the filing of the proof of death. You are instructed that under the statute the burden is upon the defendants to prove by a fair preponderance of the evidence that the insured was, in fact, alive within the period. This fact may be proved by either direct evidence or circumstantial evidence. Adequate proof of facts and circumstances inconsistent with the presumption of death, from which it may be inferred that the insured was, in fact, alive within the period, will overcome the presumption of death. However, you are cautioned that proof of facts and circumstances which create in your minds a mere suspicion that the insured was alive within the period will not overcome the presumption of death. The presumption of death is conclusive, as a matter of law, in the absence of proof that the insured was, in fact, alive. Therefore, if you find that the insured was, as contended by the defendants, in fact alive within the seven years next preceding the filing of the proof of death, the verdict shall be in favor of the defendants and against the plaintiffs" (R. 526a, 527a, 528a).

The court further charged the petitioner's 12th and 13th requests to charge (R. 532a) in which the jury was told that if they conclude Robert J. Barnett was alive at any time within the seven years prior to February 27, 1940, or after February 27, 1933, then the respondents cannot recover, and further charged them, as requested, that if the jury believed the testimony of one or more of the witnesses of the petitioners and was satisfied that one or more of those

witnesses did see or hear from Robert J. Barnett after February 27, 1933, the verdict must be for the defendant.

The petitioners contend that the Trial Court committed error in its charge on the burden of proof. As the Circuit Court so soundly pointed out, the petitioners seek to sustain this contention by isolating two sentences from the charge. However, considering the whole charge of the Trial Court it is clear that it properly charged the law applicable to the facts.

The petitioners now also contend that there is but one issue, namely; is the insured dead?; and that, therefore, the Trial Court's charge was erroneous. In this argument the petitioners disregard the express language of the statute. It is respectfully submitted that the Trial Court, in conformity with the provisions of the statute, properly and correctly advised the jury that the respondents had the burden of establishing the basic elements that give rise to the statutory presumption of death. It then advised them that this presumption must prevail, unless it is proved that the insured, Barnett, was, in fact, alive. The petitioners, under the wording of the New Jersey statute and the cases decided thereunder, were the proponents of the proposition that Barnett was in fact alive.

In *Hoyt* v. *Newbold* (Sup. Ct. 1883), 45 N. J. L. 219, the learned court said:

> "The plaintiff insists that the burden of proof is on the defendant to show that Abraham Tuers, Jr., was dead when the deeds to plaintiff were given. The language of the statute will not admit such construction. The presumption of death after continued absence of over seven years successively, *must be overcome by proof* that the person was living. (Italics Court's.)
>
> "In 2 Greenl. on Ev., §278, the writer uses the following language, viz.: '* * *. But however this

> may be as a mere presumption of law, the rule is now settled for most judicial purposes that the presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living, after which *the burthen of proof is devolved on the party asserting the life of the individual in question.*'" (Italics ours.)

The *Hoyt* case was approved and followed by the Court of Errors and Appeals in *Meckert* v. *Prudential Ins. Co.*, 114 N. J. L. 320, 176 Atl. 587.

An analogous situation arises under the New Jersey statute providing that certain proof shall be *prima facie* evidence of the violation of the statute relative to spark arresters on railroad engines (now N. J. R. S. 48:12-86). Under that statute the Court of Errors and Appeals in *Goodman* v. *Lehigh Valley R. R. Co.*, 78 N. J. L. 317, 74 Atl. 519, said:

> "* * * The court rejected the latter contention on the ground that to accept it would render the section utterly futile, and held that the legislative design was to declare that when fire was communicated to property by any locomotive engine, that fact should be *prima facie* evidence that all practicable means had not been employed by the company to prevent the communication of fire, and so placed upon the company the burden of proving the exercise of due care.
>
> "With this construction we agree."

The cases under the New Jersey negotiable instrument law are a further illustration of the effect of statutory provisions with respect to the question of who has the burden of proof. In *Crown Capital Corp.* v. *Broderick* (Sup. Ct. 1943), 130 N. J. L. 198, 32 Atl. 2d 289, a suit had been

brought upon a promissory note. In reversing a judgment for the defendant, the court said at page 199:

> "* * * When the plaintiff produced the note in evidence it made out a *prima facie* case. It was not necessary to establish the amount due on the note for the burden of proof of payment rests with the defendant. *Trustees System Company of Newark* v. *Lisena*, 106 N. J. L. 549; 150 Atl. Rep. 373. * * *"

In *Trustees System Co.* v. *Lisena* (Ct. of E. & A., 1930) 106 N. J. L. 549, 150 Atl. 373, cited in the *Crown Capital Corp.* case, it was held that the debtor under an outstanding promissory note had the burden of proof that payment had been made.

In *Fidelity Union, &c. Co.* v. *Decker, &c., Co.* (Ct. of E. & A., 1930), 106 N. J. L. 132, 148 Atl. 717, suit was instituted to recover the amount due on a promissory note. The Court said, 106 N. J. L., at 135 and 136:

> "The burden was upon the appellants to establish, in order to escape liability, that the plaintiff-respondent had knowledge of the infirmity in the note in question at the time it was discounted, and further, that the proceeds of the said note had not been checked out by the bank. * * *; and as the legal presumption is, that the holder of a negotiable instrument, transferred to him, before maturity, is a *bona fide* holder for value, the burden rests upon the defendant to establish otherwise."

The cases to which the petitioners refer, such as *Kresse* v. *Metropolitan Life Ins. Co.* (E. & A., 1933), 111 N. J. L. 474, 168 Atl. 634 and *Schlosser* v. *Goldberg* (Sup. Ct., 1939), 123 N. J. L. 470, are not in point. In the *Kresse* case, the court held that the plaintiff seeking recovery under an accident policy which had a provision against recovery for death

by suicide, had the burden of proving that the death was accidental within the meaning of the policy. The plaintiff was the proponent of the issue that the death was accidental, and the judicial presumption against suicide did not shift the burden.

In the *Schlosser* case an action for personal injuries resulting from drinking carbonated water sold by the defendant and allegedly containing foreign matter, the court properly held that a request to charge, which amounted to a request that the defendant has the burden of proving its freedom from negligence was obviously a bad charge.

It is respectfully submitted, therefore, that a reading of the entire charge of the Trial Court will show that the case was submitted to the jury in accordance with the law of New Jersey as expressed in the statute and in the cases. The Trial Judge properly instructed the jury what the respondents were required to prove under the presumption of death statute.

The petitioners, at the trial, attempted to show by witnesses that Barnett was alive during the statutory period. The Trial Court plainly instructed the jury that they must be satisfied that the respondents had established by the preponderance of the evidence the basic elements necessary to invoke the declaration of death under the statute. The Trial Court equally correctly told the jury that the petitioners having asserted, as they must under the statute, that this man is, in fact, alive must prove that issue. The charge was fair and complete and nothing could have been more favorable to the petitioners than the court's charging their 13th and 14th requests to charge, in which the jury was told in the closing moments of the charge that if they believed the testimony of one or more of the petitioners' witnesses and are satisfied that one or more of those witnesses did see or

hear from Robert James Barnett after February 27, 1933, then the verdict must be in favor of the petitioners (R. 532a and 533a).

II.

The Circuit Court of Appeals in holding that the Trial Court's exclusion of the inventory and account of receiver (Ex. D-9) was not harmful error has not decided an important question of Federal law which has not been but should be considered by this Court.

The petitioners offered in evidence a copy of the inventory and account (Ex. D-9, p. 86, Vol. II, offered R. 344a) of the receiver appointed in the suit between Edward W. Simpson and the Discount Corporation. The correctness of the Trial Court's ruling appears from the colloquy between counsel and the court which occurred at the trial (R. 344a). The inventory was offered for the purpose of showing that the Discount Corporation was insolvent at the time Barnett disappeared. This fact was proved by the decree of the Court of Chancery of New Jersey declaring the Corporation insolvent, which was in evidence (Ex. D-10, not printed in record, offered R. 347a). The inventory itself contained conclusions of an auditor and appraisers who, of course, were not available for cross-examination.

In making the argument that the inventory and account (Ex. D-9) was admissible and that the Circuit Court of Appeals' affirmance of the District Court's rejection resulted in a decision of an important question of Federal law which has not been but should be decided by this court, the petitioners fall into serious error. The petitioners in this suit and in their brief have attempted to create the

impression that the respondents were relying for recovery upon the theory that the insured was a suicide. This is not the fact, as the pleadings, proof of claim and the colloquy between court and counsel (R. 321a) show. They further seek to substantiate their contention by asserting that Ex. D-9 was material as to the motives for the disappearance of the insured. As was pointed out by the New Jersey Court of Errors and Appeals in *Meckert* v. *The Prudential Ins. Co.* (Ct. of E. & A., 1934), 114 N. J. L. 320, 176 Atl. 587:

> "Irrespective of the decisions by the courts of this state, counsel for appellant argues that the fact that the insured was a fugitive from justice overcomes the presumption of death to which the above-mentioned statute refers. The fact that the insured was wanted for forgery or other crimes may have been a motive for disappearing but such reason would not be sufficient for remaining away for a period of over seven years and, therefore, such fact would not overcome the presumption of death as a matter of law. * * *"

The case of *Equitable Life Assurance Society* v. *Sieg* (C. C. A. 6th 1931), 53 F. 2d 318, cited by the plaintiffs, is not in point. The statute in question in the *Sieg* case uses the express words "unexplained absence." Those words are not part of the New Jersey statute.

The petitioners also contend that the inventory and account was competent evidence under 28 U. S. C. 695. Of course, if the evidence is not material to the issue in the case, as the respondents respectfully submit, the provisions of that statute are of no avail to the petitioner.

The cases which the petitioners have cited do not support their contention. In *United States* v. *Mortimer* (C. C. A. 2d, 1941), 118 F. 2d, 266, Cert. Den. 314 U. S. 616, the

document or record involved was a chart prepared by one of the witnesses assisted by several aides. This witness actually took the stand. As a matter of fact the reliability of the charts was not questioned and a number of the defendants and their witnesses had found no disparity in the charts.

As was pointed out in *Palmer* v. *Hoffman* (1943), 318 U. S. 109 and in *Ulm* v. *Moore-McCormack Lines* (C. C. A. 2d 1940), 115 F. 2d 492, rehearing denied 1941, 117 F. 2d 222, Cert. Den. 313 U. S. 567, the purpose of 28 U. S. C. 695 was to make admissible in evidence the records made "in regular course" of business without requiring the individual testimony of each person involved in making such record. In *Palmer* v. *Hoffman* the statement of the engineer of a train involved in an accident, which had been given in an interview with an assistant superintendent of the railroad, was considered not to be made "in the regular course" of business within the meaning of the Act. As Mr. Justice Douglas said:

> "* * * The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. * * * If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide

> the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met."

In the case at bar the petitioners were attempting to submit in evidence the reports and conclusions of auditor and appraisers which had been furnished to the receiver in another suit. In other words, it was not the records of the Discount Corporation as such, but a report, conclusions and opinions as to such records. This, it is respectfully submitted, was not what was contemplated by 28 U. S. C. 695.

As a matter of fact the Circuit Court of Appeals did not render an opinion upon the applicability of said Act. It is apparent from what has been hereinbefore stated that such a decision was unnecessary. The Circuit Court of Appeals in accordance with the recognized Federal rule determined that where the fact has been established by other evidence, its exclusion is harmless error. *Northern Pac. R. Co.* v. *Mortenson* (C. C. A. 8th 1894), 63 F. 530, error dismissed 166 U. S. 997. *Drumm-Flato Commercial Co.* v. *Edmission*, 208 U. S. 543.

As has been pointed out, the financial difficulties and the seriousness of them was fully before the jury. The insolvency of the Discount Corporation was proved by Ex. D-10. Even the insured's last letter to his wife (Ex. P-4) showed his financial difficulties. It is respectfully submitted that the Trial Court's exclusion of the documentary evidence in question did not constitute harmful error.

Conclusion.

For the reasons hereinbefore set forth, it is respectfully submitted that this Court should deny the petition for Writs of Certiorari.

Respectfully submitted,

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